Supreme Court, U.S.
FILED
MAR 2 - 2000
CLERK

(2)

No. 99-1291

In The

Supreme Court of the United States

JF HOTEL MANAGEMENT, INC.,

Petitioner,

v.

THOMAS FLYNN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PETER C. BURKERT
Fla. Bar No. 236561
Co-Counsel for Respondent Flynn
BURKERT & HART, P.A.
2205 McGregor Boulevard
Post Office Box 2485
Fort Myers, FL 33902-2485
(941) 337-5920 facsimile
(941) 337-4800 voice

ROBERT L. DONALD*
Fla. Bar No. 218219
Appellate Counsel for Respondent Flynn
LAW OFFICE OF ROBERT L. DONALD
1375 Jackson Street, Suite 402
Fort Myers, FL 33901-2841
(941) 337-1170 facsimile
(941) 337-1999 voice

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. Course of Proceedings 1

1. The first meeting in Naples 4

2. The second meeting in Memphis 6

3. The Plaintiff's Dismissal on 9 June 1994 8

4. The Events after 9 June 1994 13

5. Summation of the Facts 14

ARGUMENT AGAINST CERTIORARI 15

A. The *Reeves* case is readily distinguishable 16

B. There is no conflict between *Reeves* and the instant case 17

C. In *Reeves* there was no issue as to the sufficiency of the employer's motions for directed verdict 19

D. There is no conflict between *Reeves* and the Eleventh Circuit's *Combs* case, and even if there were, it would not assist JFH in this case 19

E. Certiorari is not appropriate to review factual decisions 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997), cert. denied 522 U.S. 1045 (1998)....19, 20

National Labor Relations Board v. Pittsburgh S. S. Co., 340 U.S. 498,503 (1951)..... 20

Reeves v. Sanderson Plumbing Products, Inc., No. 98-60334..... 16, 17, 18, 19

ADMINISTRATIVE AND COURT RULES

Eleventh Circuit Rule 36-1 3

STATEMENT OF THE CASE

This Brief in Opposition is submitted on behalf of the Respondent, Thomas Flynn. Mr. Flynn was the Appellee in the Eleventh Circuit and the Plaintiff in the District Court, and he will be addressed herein by surname or as "the Plaintiff." The Petition for Certiorari has been brought by JF Hotel Management, Inc., one of the Appellees in the Eleventh Circuit and one of the Defendants before the District Court. The Petitioner will be addressed herein as "JFH". JFH has included several relevant documents in its Appendix, and rather than duplicating these documents in another appendix, the Plaintiff will simply refer to JFH's Appendix as "JFH/APP" followed by the pertinent page number.

A. Course of Proceedings

The facts of this case were established early during discovery, and JFH has been making the same arguments that it makes to this Court almost from the beginning of this case. JFH's Motion for Summary Judgment in the District Court argued that Mr. Flynn could not make a prima facie case or show that JFH's reasons were pretextual. The District Court denied the Motion, finding that the Court was of the "firm opinion" that the case should be submitted to a jury. At trial JFH moved for a directed verdict on this same basis, and again its evidentiary arguments were rejected. JFH renewed its evidentiary argument at the conclusion of all the evidence, and again it was denied.

The District Court instructed the jury on the *McDonnell-Douglas* burden-shifting test without any objection from JFH, nor did JFH object to the verdict form. The jury's verdict found that the Plaintiff's disability "was a motivating factor in the decision of Defendant to terminate his employment," and awarded him compensatory damages of $65,000 and punitive damages of $150,000. So the jury rejected JFH's evidentiary arguments also.

JFH submitted a Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial. JFH raised five issues, one of which was that the jury's verdict was not supported by the evidence. The District Court found in its Order that JFH had not preserved the first four issues at trial. (JFH/APP 5) As to the sufficiency of the evidence, the District Court held that JFH had preserved the issue as to the Plaintiff's prima facie case, but had not preserved the issue of pretext. (*Id.*) The District Court nevertheless considered all of JFH's arguments concerning the sufficiency of the evidence, since a new trial can be granted even without proper preservation at trial. (*Id.*) The District Court then rejected all five of JFH's arguments, finding that the verdict was supported by the evidence and that the compensatory and punitive damages were justified. (JFH/APP 6)

JFH never questioned the burden-shifting method in the District Court, did not object to the jury instructions, did not object to the verdict form, and did not argue, as it seems to before this Court, that there is some confusion about the *St. Mary's* case. The District Court instructed the jury that it must find that the Plaintiff's firing "was based upon his disability," and the verdict form required

the jury to find that the Plaintiff's disability was a "motivating factor" in his discharge. So the District Court applied the very law that JFH now touts as being the "Fifth Circuit" view that is favorable to its position.

JFH appealed the verdict and Judgment to the Eleventh Circuit. It questioned the sufficiency of the evidence to support the verdict, and also argued that the District Court had erred in finding that it had not properly preserved its evidentiary arguments. On 7 October 1999 the Eleventh Circuit entered its per curiam affirmance without opinion under Eleventh Circuit Rule 36-1. (JFH/APP 1-2) This Rule permits the Court to issue a PCA when "the evidence in support of a jury verdict is sufficient," or where no error of law has occurred and a written opinion "would have no precedential value." JFH filed an extensive Petition for Rehearing en Banc. The Petition was denied, since no Judge of the Eleventh Circuit voted in favor of such relief. (JFH/APP 9)

B. The Facts

Mr. Flynn was born and raised in Chicago, and when he was 11 years old his right hand was crushed. He lost the middle three fingers on his right hand, giving the hand a pincer-like appearance due to the opposition of his little finger and thumb.

In Chicago Mr. Flynn worked in the maintenance and engineering fields. He had two long-term jobs: one with a hotel company and another with the State of Illinois. Mr. Flynn and his wife came to Florida in the late 1980's to be near relatives, and he quickly obtained a job at the new

Hampton Inn that was just opening in Naples. The Hampton Inn was operated by JFH, and Mr. Flynn had been hired by Denis Longchamps, the manager of the hotel and a JFH employee. Mr. Flynn would work at the hotel for Mr. Longchamps for the next four years until he was fired on 9 June 1994.

Mr. Longchamps testified that Mr. Flynn was a substantial reason for the success of the hotel. He said the Plaintiff "did more with that [disabled] hand than I could do with two good hands." He recommended the Plaintiff for various awards, and gave him periodic raises. The Plaintiff even won a national award from Hampton Inns known as "the President's Award." This is the highest honor given by Hampton Inns, and Mr. Flynn was the only employee of the hotel ever to win the award.[1] So the undisputed evidence shows that Mr. Flynn was an exemplary employee for his entire tenure with JFH. But in 1994 Mr. Langley would come on the scene, and that's when the events occurred in rapid succession that ended with the Plaintiff's dismissal.

1. The first meeting in Naples

Mr. Langley became the regional manager for JFH in early 1994. In this capacity he oversaw three or four hotels, one of which was the Naples Hampton Inn. JFH states on page 3 of its Petition that Mr. Langley was the

---

[1] Mr. Flynn received a cash payment and a trip to the awards ceremony from Hampton Inns. JFH implies on page 4 of its Petition that it paid these sums to the Plaintiff, but the evidence shows that Hampton Inns paid this money.

"Director of Operations" for JFH at this time, but this is incorrect. Mr. Langley would later ascend up the JFH hierarchy, but at the time of this encounter Mr. Langley was only a regional manager with several hotels under his control.

Mr. Langley first came to the Naples hotel at the end of April of 1994 to "get acquainted." He had a meeting with Mr. Longchamps, where all of the employees (including Mr. Flynn) were discussed.[2] Mr. Langley then met the employees, and the accounts of the meeting between Mr. Langley and the Plaintiff are conflicting. Both could not be correct. As JFH's own counsel advised the jury during his opening statement, the jury would have to make a credibility determination.

The Plaintiff said that when he approached Mr. Langley upon first meeting him the following occurred:

> Well, I shook hands with him, and he jumped back from me and – not actually jumped back, but gave like a recoil and actually like astonished look. I have had different encounters shaking hands with somebody, you know, really affects them badly and they don't like it.

He said the look Mr. Langley gave him, as well as the recoil, told him that Mr. Langley was affected by his

---

[2] JFH states that Mr. Langley had not said anything to Mr. Longchamps at this meeting concerning the Plaintiff's disability, thereby indicating that this was of no concern to him. However, this meeting occurred **before** Mr. Langley actually met the Plaintiff, and therefore before he knew about the Plaintiff's disability.

disability as others had been in the past. After the handshake the Plaintiff followed Mr. Langley around as he and Mr. Longchamps looked at various rooms. Mr. Langley said nothing more to the Plaintiff at all, even though the inspection of the rooms was within the sphere of Mr. Flynn's responsibility. There was no farewell handshake at the conclusion of this meeting.

Mr. Langley gave a different version of this first meeting. He testified that when he met the Plaintiff he shook hands with him and did not recoil in any way. He said his inspection showed that the hotel was in good shape. He had a specific recollection of the things he checked in the hotel, and he recalled making small talk with the Plaintiff during the inspection. This version of the first meeting given by Mr. Langley at trial was in conflict with his deposition testimony. He had been deposed two years before trial, and at that time (only two years after the incident) he said he didn't recall any of the details of the meeting with Mr. Flynn. When asked why his memory seemed so much better at trial than it had been two years before, Mr. Langley responded that it was because he had been thinking about it more, that "the plain truth is I forgot maybe at that time [of his deposition]."

2. The Second Meeting in Memphis

The second and last time that the Plaintiff and Mr. Langley would personally meet was in Memphis several weeks after their first encounter. Mr. Flynn was in Memphis to receive his President's Award at the Hampton Inns annual convention. The Plaintiff encountered Mr.

Langley at the convention, and again their recollections of the incident differ markedly.

The Plaintiff said he ran into Mr. Langley in the lobby of the Peabody Hotel. He said hello to Mr. Langley, but Mr. Langley feigned unfamiliarity with him. The Plaintiff explained who he was, and Mr. Langley said "I don't know what you're doing here." The Plaintiff explained that he was there to receive the President's Award, to which Mr. Langley said "I didn't know you won that," and left. Mr. Langley was not at the presentation ceremony, though he was the Plaintiff's superior.

It will be recalled that the Plaintiff was the only person ever to win the President's Award from the Naples Hampton Inn, which was one of only three hotels under Mr. Langley's control. When the Plaintiff won the award he was personally called and congratulated by the President of Hampton Inns, and an article appeared in the Hampton Inns magazine.

Mr. Langley gave a much different version of the Memphis encounter. He testified that he did not know that the Plaintiff was going to be at the convention. When he ran into the Plaintiff in the hotel lobby, he said "I was happy, I was excited, I was proud." He said he remembered shaking the Plaintiff's hand and having a conversation with the Plaintiff's wife. They talked for awhile, and they then parted company amicably. Once again, Mr. Langley had given a drastically different story when he was deposed two years before. He said at his deposition he didn't remember anything about the meeting in Memphis, and couldn't explain why his memory was so much better two years later at trial.

3. The Plaintiff's Dismissal on 9 June 1994

All agree that Mr. Flynn left the employ of JFH on 9 June 1994, shortly after the last meeting in Memphis. On that Thursday morning Mr. Flynn arrived at the hotel early as he usually did. Mr. Longchamps (the manager) had been gone several days to a "sales blitz" in Tampa.

Mr. Flynn was at his station in the laundry area when he received a buzz from the front desk. He went up to the front desk and was told by the clerk that Mr. Langley was on the phone for him. He then went into the office behind the front desk and picked up the phone. Mr. Langley said that he had received an expense report that was done all wrong, and he wanted to fax a copy to the Plaintiff and teach him how to do it correctly. The Plaintiff did not do expense reports (Mr. Longchamps did), and he asked Mr. Langley if he wouldn't prefer to wait until Mr. Longchamps was back at the hotel. Mr. Langley replied that he did not prefer to wait. So the Plaintiff said he would call back as soon as he got the fax. During the telephone conversation Mr. Langley was "rude, loud and very – treated me very badly." The Plaintiff said that Mr. Langley "wasn't talking to me, he was talking at me." This telephone conversation made the Plaintiff anxious and upset.

When the Plaintiff got off the phone he paged Mr. Longchamps in Tampa. Mr. Longchamps called back almost immediately. Mr. Longchamps told the Plaintiff not to worry about the expense report, that it wasn't his job, and that he (Mr. Longchamps) would straighten things out with Mr. Langley. The Plaintiff told Mr. Longchamps that he didn't feel well, "that I felt like my blood

pressure was getting high or something – if I don't feel any better I may have to go to the doctor." Mr. Longchamps told him not to worry and to just go back to work. That's exactly what the Plaintiff did, and he never left the hotel until he was summoned by the assistant manager several hours later.

At around noon Mr. Flynn was beeped again by the front desk, and told that Amy McNichols, the assistant manager, wanted to see him. He went to her office, and she told him to turn in his beeper and keys because "John Langley said you quit and [you should] get off the property." The Plaintiff remonstrated that he had not quit, but Ms. McNichols said she had no choice but to follow Mr. Langley's instructions to usher him from the property.

While the Plaintiff was talking with Ms. McNichols, Mr. Longchamps called. The Plaintiff told him that he had not quit. Mr. Longchamps said that he was sorry, but "John Langley wants you out of here, he said you can't come back, he does not want you here." This was the only job the Plaintiff was ever fired from in his entire life.

Mr. Longchamps was a major character in the events of June 9, even though he was not personally present at the hotel until after the Plaintiff had been fired.[3] Mr.

---

[3] JFH grouses about the use of Mr. Longchamps' deposition at trial on page 4 of its Petition. Yet at trial JFH conceded that it had counsel at the time of the deposition, and counsel had been given proper notice of the deposition. For reasons known only to JFH, its counsel did not appear at the deposition nor seek to re-depose Mr. Longchamps. Mr. Longchamps was in New England at the time of trial. In any event, the use of the deposition was not argued as error by JFH in the 11th Circuit.

Longchamps had been in Tampa the whole week. Mr. Langley knew that he was in Tampa. There was actually another executive from JFH with him at the meeting.

Mr. Longchamps first learned that something was wrong at the hotel from his wife, who also worked at the hotel and was there that day. As soon as Mr. Longchamps finished talking with his wife his beeper went off again, and it was Mr. Langley. Mr. Langley "just blew a gasket." He stated in a very heated fashion that he had called the hotel and Mr. Flynn had been unwilling to comply with his request. In this discussion Mr. Langley "seemed to have very little regard for Tom." Mr. Longchamps said he couldn't "get two words in edgewise."

Mr. Longchamps had a second conversation with Mr. Langley shortly after the first one. Mr. Langley told him that he wanted Mr. Longchamps to "write him [Mr. Flynn] up for insubordination." Mr. Longchamps told Mr. Langley that he understood the Plaintiff had been so upset by the call that he had left the hotel "to go see a doctor or went to the hospital because of his blood pressure." When Mr. Longchamps told Mr. Langley this, it "was like a breath of fresh air to John [Langley] . . . I really think that was something John was looking for." Mr. Langley said, "If he comes back, you tell him to leave his pager with you, he's finished, he's through." He "made it very, very clear Tom was not going to come back. Period."

Mr. Longchamps said that Mr. Langley called Amy McNichols as soon as he got off the phone with him and told her to get the Plaintiff's pager and keys because "we weren't going to need his services any longer."

Mr. Longchamps said that the Plaintiff was terminated by JFH, and had not quit. He believed that Mr. Langley used the speculation about the Plaintiff leaving the hotel for medical purposes as an excuse to fire him. He said that Mr. Langley was out of line, and the Plaintiff had not been treated fairly in his termination. Mr. Longchamps summarized his opinion as follows:

> I believe that the company terminated him. That's the way the company wanted it. That's the way the company made it clear to me, I believe they made it clear to Amy [McNichols], and as far as Tom's termination, that was not voluntary at all.

So the manager of the hotel, who was the Plaintiff's direct superior and an employee of JFH, said that Mr. Flynn had been fired and had not quit.

Leticia Gerbec was one of the two witnesses presented by JFH. She presently holds the job that the Plaintiff had when he worked at the hotel. On 9 June 1994 she had not yet been promoted, and she was the front-desk clerk on duty when Mr. Langley called. Mr. Langley told her he wanted to speak with the Plaintiff, and Ms. Gerbec told him she would have Mr. Flynn return the call. She said she then buzzed Mr. Flynn and told him that Mr. Langley wanted to speak with him, but he (Mr. Flynn) refused to return the call. Ms. Gerbec said she then called Mr. Langley and told him that the Plaintiff had declined to call him back and that "he doesn't have time." He told her to have Amy McNichols call him when she came in later, but that he still wanted the Plaintiff to call him back. When the Plaintiff later came to the front desk, Ms. Gerbec said she told him again that he was to call Mr.

Langley. He again refused, and a few minutes later, according to Ms. Gerbec, he walked by her saying that he quit. Ms. Gerbec said that Mr. Langley called back a short while later, and she told him that the Plaintiff had quit. So Ms. Gerbec testified that the Plaintiff never actually talked with Mr. Langley, but quit in a huff. This is contrary to every other witness that testified about the events of June 9 – the Plaintiff, Mr. Longchamps, and even Mr. Langley himself.

There were some other discrepancies in Ms. Gerbec's testimony. Ms. Gerbec had executed an affidavit in support of JFH's Motion for Summary Judgment, and the affidavit said nothing about the Plaintiff quitting; yet this was a critical part of JFH's argument for summary judgment.

JFH's second and last witness, Mr. Langley, gave a version of the events of June 9 that was different from that of Mr. Flynn, Mr. Longchamps, and even Ms. Gerbec. He said he called the hotel that day because "an expense report was repeatedly being filled out incorrectly." He said he had forgotten that Mr. Longchamps was in Tampa. He told the desk clerk (Ms. Gerbec) that he would fax an expense report down, and he wanted Mr. Flynn to call him after the report arrived. Mr. Langley said he talked with Mr. Flynn a short time later. Mr. Langley said that he and Mr. Flynn had a nice conversation, "no hostilities," that it was "cordial and pleasant." He said that he had not been rude to Mr. Flynn, and Mr. Flynn had not acted improperly with him. Mr. Langley said that several hours later he received a call from Mr. Longchamps. Mr. Longchamps reportedly told him, "Tom flew off the

handle, was angry, he quit, walked off the job." Mr. Langley said he was dumbfounded.[4]

4. The Events after 9 June 1994

About two weeks after the firing Mr. Flynn applied for unemployment. JFH resisted his application on the basis that "the claimant [Mr. Flynn] was discharged for alleged insubordination."[5] So two weeks after the Plaintiff's dismissal JFH officially stated, contrary to Mr. Langley's testimony at trial, that the Plaintiff had been fired for insubordination. The Plaintiff did receive unemployment compensation. The Department of Labor found that JFH did not substantiate its claim of insubordination, and that "the discharge was for reason other than misconduct connected with work."

In October of 1994, about four months after the Plaintiff's dismissal, JFH stated in its answer to the Plaintiff's EEOC complaint that the Plaintiff "had walked off the job after non-compliance to a direct order from the Vice President of Operations, John Langley." So by the time of

---

[4] JFH states on page 7 of its Petition that it's "undisputed" that Mr. Langley was told by Mr. Longchamps and Ms. Gerbec that Mr. Flynn had quit. This is just plain incorrect. Mr. Longchamps never testified that he told Mr. Langley any such thing. Ms. Gerbec did say this at trial, but had not in her affidavit before trial. It is also clear that Mr. Flynn had told both the assistant manager and the manager of the hotel (both JFH employees) that he had not quit, but both had responded that Mr. Langley still wanted him gone immediately.

[5] Mr. Longchamps had submitted this response on behalf of JFH with explicit instructions from Mr. Langley, which Mr. Longchamps did not agree with.

the EEOC filing JFH's position was beginning to evolve toward its position manifested at trial, but there were still critical differences. Mr. Langley denied at trial that Mr. Flynn had been insubordinate or impolite to him in any way, while in the EEOC filing JFH said that the Plaintiff had disobeyed a direct order from Mr. Langley.

5. Summation of the Facts

To summarize the facts considered by the jury, it is undisputed that Mr. Flynn was an exemplary employee that was instrumental in the success of the hotel. He had never been fired from a job in his life, and he had put in four good years with JFH. Mr. Langley then became his superior, and Mr. Flynn was fired a short time later. The jury was entitled to believe that Mr. Langley expressed revulsion at the Plaintiff's disability when they met for the first time, and was cursory in his treatment of Mr. Flynn during the remainder of this first meeting. The jury could believe that Mr. Langley pretended not to know the Plaintiff when they met in Memphis two weeks later, where Mr. Flynn had gone to receive Hampton Inns' highest award, and that Mr. Langley did not attend the awards ceremony because he was embarrassed by Mr. Flynn. The jury was entitled to believe that Mr. Langley called the hotel on June 9 knowing that Mr. Longchamps would not be there, and manufactured an issue upon which to dispute with Mr. Flynn. The jury could believe that Mr. Langley fired the Plaintiff, and then fabricated the story that the Plaintiff had somehow "quit".

The jury could believe that JFH stated in the official records for unemployment that the Plaintiff had been

fired for insubordination, but then tried to change its story as time went by. The jury could observe that JFH's only two witnesses at trial gave testimony that was internally and externally inconsistent. The jury could also observe that both Mr. Langley and Ms. Gerbec had changed their testimony since the discovery phase of the case, "remembering" facts that were favorable to JFH's position and that were contradicted by the evidence presented by the Plaintiff. Finally, the jury could observe that JFH's own employees, *i.e.*, Mr. Longchamps and Ms. McNichols, gave testimony consistent with the Plaintiff's evidence and inconsistent with Mr. Langley's and Ms. Gerbec's testimony.

The bottom line is that a great employee has been fired by a supervisor shortly after the supervisor expressed revulsion at his disability, with no plausible explanation for why this occurred. To the contrary, the case is replete with markers of fabrication and pretext by JFH, and certainly the jury was justified in believing that the real motivation for Mr. Flynn's firing was his disability. Both the District Court and the Eleventh Circuit so concluded, and it is respectfully submitted that there is no reason for this Court to further review this case.

ARGUMENT AGAINST CERTIORARI

JFH's framing of the questions presented for review shows, it is respectfully submitted, how inappropriate certiorari review would be in the instant case. Rule 14 states that the questions presented "should be short and should not be argumentative or repetitive." JFH has

stated two long, involved questions that presuppose a factual scenario that is not supported by the evidence of this case. JFH states in the first question that even though there "is some evidence" that Mr. Flynn's firing was pretextual, there is no evidence that the "true reason" for the firing was discrimination based on Mr. Flynn's handicap. "True reasons" are probably beyond determination by mere mortals. And there is no case from this Court or any circuit court intimating that a plaintiff must produce undisputed proof of the "true reasons" for his discharge. In the final analysis JFH disagrees with the conclusions of the finder of fact, and this, it is respectfully submitted, is not an appropriate basis for this Court to exercise its certiorari jurisdiction.

A. The *Reeves* case is readily distinguishable.

The main thrust of JFH's Petition is that this Court should grant certiorari here because it did so in another employment-discrimination case, *Reeves v. Sanderson Plumbing Products, Inc.*, No. 98-60334. JFH brought the *Reeves* case to the attention of the Eleventh Circuit, without success. Even a cursory examination of *Reeves* shows why the case is of no assistance to JFH. First, *Reeves* involved an age-discrimination claim under the Age Discrimination in Employment Act, and not a disability claim under the Americans with Disabilities Act as does this case. Further, the employer in *Reeves* offered legitimate reasons for why it had fired Reeves and two other employees (one of which was quite young). Here JFH did not offer a legitimate reason for why Mr. Flynn was fired; rather, it denied that he had been fired in the first place,

and the jury did not believe this assertion. Another distinction is that in *Reeves* the plaintiff had a history of bad performance, and here Mr. Flynn had an exemplary record of employment. Another important distinction is that in *Reeves* the court held that the employer had given consistent reasons for the discharge, but noted that "proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a 'red flag' of pretext"; here JFH drastically changed its stated reasons for why (or whether) Mr. Flynn was fired, thus raising the "red flag" spoken of in *Reeves*.

B. There is no conflict between *Reeves* and the instant case.

The legal pronouncements made in *Reeves*, to the extent they can be applied to an ADA case, are perfectly consistent with the law applied by the District Court in the instant case. The District Court showed by its jury instructions and pronouncements that it understood the elements of a prima facie case to be the exact same elements that JFH is now touting as the Fifth Circuit view. So *Reeves* is of no assistance to JFH in its statement of the law. What JFH is trying to do is make a ***factual*** comparison between the instant case and *Reeves*. This comparison fails for the reasons stated above, but in any event, these factual similarities and dissimilarities are no reason for this Court to grant certiorari.

Though JFH says the instant case conflicts with *Reeves*, it does not specify what this conflict is. The unpublished *Reeves* decision makes no legal pronouncements that conflict with any rule of law applied here. This

Court's Order granting certiorari in *Reeves* does not state why certiorari is being granted, but it must be recalled that certiorari was granted in that case at the behest of the plaintiff/employee, and not upon the petition of the defendant/employer. So if there is a change in the legal concepts applying to an ADEA case as a result of *Reeves*, the change might well be negative for an employer. This Court's review in *Reeves* will likely center around the issue of whether the comments of the supervisor constituted direct evidence of prejudice that would have been sufficient by themselves to present a jury issue.

There are a number of problems with JFH's theory that the instant case somehow conflicts in spirit with *Reeves*. But even if such conflict did exist, which it does not, it is difficult to see why this Court would accept certiorari in the instant case. The *Reeves* case will serve as the vehicle for this Court to review whatever legal rules that employers such as JFH think should be reconsidered. So why does this Court need to accept certiorari here? JFH has already had the appellate review to which it has any right. There is no obligation for further review, and this Court's certiorari jurisdiction is not primarily an error-correcting procedure. Unless this Court is inclined to accept certiorari in every employment-discrimination case that comes along simply because it now has under review an employment-discrimination case, then there is no reason to accept certiorari in this case.

C. In *Reeves* there was no issue as to the sufficiency of the employer's motions for directed verdict.

Perhaps the most important distinction between *Reeves* and the instant case is that here JFH did not make proper motions at trial to preserve the issue of whether it was entitled to a judgment as a matter of law on the sufficiency of the evidence to support the verdict in favor of the Plaintiff. The District Court specifically so held, and the Eleventh Circuit affirmed this finding on appeal. *Reeves* involved no such issue. The instant case therefore has an element that was not present in *Reeves*. So if this Court were to give the Fifth Circuit's *Reeves* decision the broadest effect possible, and even if the Court were to make the sweeping pronouncements that JFH apparently hopes this Court will make in *Reeves*, the result of the instant case would not be changed. Here JFH failed to preserve the issue upon which it is now trying to convince this Court to grant certiorari.

D. There is no conflict between *Reeves* and the Eleventh Circuit's *Combs* case, and even if there were, it would not assist JFH in this case.

It appears to be JFH's position that there is some inherent, implicit conflict between the respective approaches of the Eleventh and Fifth Circuits to employment-discrimination cases. The only Eleventh Circuit case cited by JFH in support of this proposition is *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998). Yet *Combs* was not cited by the District Court in its Order, was not cited by Mr. Flynn in his Answer Brief submitted in the Eleventh Circuit,

and obviously was not cited by the Eleventh Circuit in its PCA. So how does *Combs* somehow enter into the dialogue in the instant case? It should also be noted that in *Combs* this Court denied certiorari! So obviously this Court found nothing offensive in *Combs*, even if it were somehow relevant to the instant case.

E. Certiorari is not appropriate to review factual decisions.

In the final analysis JFH is asking one more Court to overturn the jury's factual findings. In *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), Justice Frankfurter said, "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other." This is what JFH is trying to do here, and it is respectfully submitted that this is inappropriate for this Court's certiorari function.

CONCLUSION

The Respondent, THOMAS FLYNN, respectfully asks this Court to deny JFH's Petition for Certiorari for the reasons set forth above.

Respectfully submitted,

ROBERT L. DONALD
Fla. Bar No. 218219
Appellate Counsel for Respondent Flynn
LAW OFFICE OF ROBERT L. DONALD
1375 Jackson Street, Suite 402
Fort Myers, FL 33901-2841
(941) 337-1170 facsimile
(941) 337-1999 voice

PETER C. BURKERT
Fla. Bar No. 236561
Co-Counsel for Respondent Flynn
BURKERT & HART, P.A.
2205 McGregor Boulevard
Post Office Box 2485
Fort Myers, FL 33902-2485
(941) 337-5920 facsimile
(941) 337-4800 voice